

**ARIZONA SUPREME COURT  
CAPITAL CASE OVERSIGHT COMMITTEE  
MINUTES  
September 24, 2012**

Members Present:

Hon. Ronald Reinstein, Chair  
Hon. Douglas Rayes  
Kent Cattani  
Donna Hallam  
Marty Lieberman  
James Logan  
William Montgomery, by proxy,  
    Anthony Novitsky  
Daniel Patterson

Guests:

Lori Ash  
Bob James  
John Todd  
Kristine Fox  
Dale Baich  
Jennifer Garcia  
Diane Alessi  
Carolyn Edlund  
Natman Schaye  
Theresa Barrett

Members Not Present:

Dan Levey

Staff:

Mark Meltzer  
Kymberly Lopez

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**1. Call to Order; approval of the meeting minutes.** The Chair called the meeting to order at 12:00 p.m. and introduced Kymberly Lopez, new staff for the Oversight Committee. The Chair then asked the members to review the draft minutes of the February 29, 2012 meeting.

**Motion:** A member moved to approve those minutes, and following a second, the members unanimously approved the February 29 meeting minutes.

**2a. Status reports: Maricopa County Superior Court.** The Chair invited members to report on the status of capital cases in Maricopa County. Judge Rayes advised that there were currently sixty-four pending cases. Since January 1, 2012, eighteen capital cases have been filed, and eighteen cases have been resolved, two by the imposition of a death sentence. The court has eight capital trials scheduled before the end of the year. Mr. Novitsky commented that the number of pending cases has stabilized in the mid-60's during calendar year 2012. He noted that his office now has ten cases in which it will conduct initial reviews for filing a notice of intent to seek the death penalty. Mr. Logan reported that he is tracking seventy-five capital cases, but his list includes five cases where the State withdrew a notice, three cases where the parties have agreed to an extension of time for filing a notice, and four cases in which the State has not yet filed a notice, but a notice is probable. He agreed that the number of pending cases this year has been relatively static.

Mr. Logan assigned several cases during 2012 to private counsel because the staffed offices were temporarily full. He does not want to give a non-capital case to a capital team in a staffed office because he wants to reserve the capital case teams for new capital cases; if the capital teams are handling non-capital cases, they will be unavailable for capital ones and that would require the use of private counsel. He speaks regularly with Mr. Patterson about the availability of capital

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counsel in the Public Defenders Office. Mr. Patterson added that with the recent completion of two capital trials, his office could now assume responsibility for a few additional capital cases.

Mr. Logan added that three of the five cases assigned to the former State Capital Post-Conviction Public Defender transferred, along with most of that agency's staff, to the Maricopa County Public Advocate. The court assigned the remaining two cases to an attorney who was previously with the state agency. Lawyers in these cases are familiar with their files, and Judge Rayes noted that he has lifted the stays in all five cases. The Chair thanked Mr. Logan and Ms. Hallam for their assistance in the transition of these cases from the state agency to new counsel.

**2b. Status reports: appeals and PCRs.** (1) Appeals: Ms. Hallam advised that there are twenty pending capital appeals. The Court has received two notices of appeal in capital cases during 2012; both of these cases are from Maricopa County. She expects that the Court will receive a third notice of appeal shortly in a Pima County case.

(2) PCRs: There are seven defendants awaiting the appointment of counsel on petitions for post-conviction relief. This number does not include Hausner, who requested that the Court not appoint counsel for a PCR. Petitions for certiorari are pending in most of the seven cases.

(3) Federal: Mr. Baich advised that most of the cases assigned to his office are currently in the Ninth Circuit, and are pending oral argument or the issuance of an opinion.

**3. Screening of capital PCR counsel.** The discussion turned to the screening of counsel in capital PCR petitions. The Chair and Judge Rayes indicated that the committee established by Maricopa County Administrative Order 2012-118 (the "Maricopa committee") would likely assume the responsibility for screening PCR counsel; however, the committee has not yet formally made this decision. They noted that the committee might decide that it would not screen attorneys statewide, but only those from Maricopa County. Some of the Maricopa committee members believe that they may not be familiar with applicants from other counties, or from other states, and there are financial and political considerations if a Maricopa committee screened non-Maricopa applicants. Moreover, Pima County may want to screen lawyers appointed on capital PCRs in that county. Mr. Logan noted that the Maricopa committee is presently responsible for screening eighteen applicants for capital trials and appeals each year for the next three years. If the committee assumed an additional duty to screen capital PCR applicants, statewide or even only those from Maricopa County, this would significantly increase its duties and the time commitment of its members. If Maricopa and Pima establish separate committees to screen PCR applicants, the Supreme Court's staff attorneys may have responsibility to screen applicants from other counties or applicants who are out-of-state.

Several members expressed concerns about not having enough qualified applicants to satisfy the need for capital PCR appointments. There is a limited pool of attorneys now who will accept appointments, and a screening committee may exclude applicants, and reduce rather than increase the number of available PCR lawyers. Mr. Schaye observed that qualified attorneys may have inadequate time to take a capital PCR, or the hourly rate of compensation is a disincentive; and that young attorneys who may be interested in appointments do not qualify

under Rule 6.8. A solution is having young attorneys gain experience by working with qualified attorneys on PCRs, but the court usually does not appoint two attorneys on these cases.

Judge Rayes requested guidance, or an order, from the Arizona Supreme Court about the authority of the Maricopa County committee to screen capital PCR applicants. He would like to assure that the Supreme Court has clearly delineated the judicial function of the Maricopa committee, and the criteria that the Maricopa committee should use if it conducts reviews of PCR applicants. Presumably, the Supreme Court would continue to make the appointments, but it should clarify this, too. The Chair will follow-up on issues related to a screening committee by making further inquiries of the Court and of Pima County's Office of Court Appointed Counsel.

**4. Proposal for earlier appointment of PCR counsel.** Mr. Cattani introduced a proposed amendment to Rule 31.2 of the Arizona Rules of Criminal Procedure. The amendment would require the trial court clerk to file a notice of post-conviction relief simultaneously with a notice of appeal in a capital case. The proposed amendment would stay the appeal pending resolution of the PCR, and consolidate a subsequent petition for Supreme Court review of the PCR with the automatic appeal. Mr. Cattani advised that this rule would require a legislative amendment to A.R.S. § 13-4234. His proposed changes are in response to a finding in a recent U.S. Supreme Court opinion, *Martinez v Ryan*, about Arizona being unique because a defendant cannot raise a claim of ineffective assistance of trial counsel ("IAC") on appeal. He noted that Arizona law that disallows an IAC claim on appeal is decisional, not statutory; the Court imposed this requirement because it wanted counsel to raise IAC issues in a comprehensive PCR rather than piecemeal on appeal. Mr. Cattani believes that witnesses' memories would probably be fresher if the trial court conducted a PCR proceeding before rather than after an appeal. This change would also make Arizona's procedures consistent with those of most other death penalty states. The Chair then invited comments on the proposal.

Mr. Logan opposed it. He pointed to data showing that sixteen percent of death penalty convictions in Arizona since 2005 have been reversed on appeal. If the court had appointed PCR counsel upon conviction in every case since 2005, counsel would not have been required in sixteen percent of those cases. He estimates that the cost of PCR counsel in a single case typically is in the hundreds of thousands of dollars, and that Mr. Cattani's proposal could unnecessarily cost Maricopa County millions of extra dollars. (Note: Mr. Lieberman calculated the sixteen percent based on sixty-one cases decided by the Arizona Supreme Court from 2005 to the present. The Court affirmed fifty-one cases, or about eighty-four percent. The other sixteen percent included four sentences reduced to life, and six remands. He did not have data on the respective portions of the sixteen percent decided on the old standard of independent review, versus the new standard of fundamental error.) Mr. Logan postulated that under Mr. Cattani's proposal, the appeal could also be more expensive because two appeals attorneys would be required: one for the customary appellate issues, and the other for the IAC arguments.

Mr. Cattani responded that it would be less expensive in the end to conduct a proceeding under his proposal. He stressed the need for finality in state court proceedings, and submitted that the cost of subsequent habeas hearings in federal court on IAC issues exceeds the expense of PCR hearings in state court on that issue. A guest questioned which process would ultimately be more reliable and produce a just result. One guest commented that a screening committee should

reduce the number of IAC claims; another guest thought it was too early to know that. A committee member noted that an early PCR would result in a lesser likelihood of loss of a defendant's file. One member queried whether Mr. Cattani's proposal might result in a greater number of remands based on IAC. Mr. Logan suggested that delaying the appeal would result in having to re-try cases later rather than sooner. Mr. Cattani added that a delayed appeal would afford the defendant the benefit of changes in the law that may have occurred in the interval.

The members reached no consensus today on Mr. Cattani's proposal. The Chair requested that Mr. Cattani consider today's comments and "fine tune" his proposal, so that if he introduces a bill, legislators will have a fair and full understanding of the issues.

**5. Draft report.** The members proceeded to the recommendations in the draft of the committee's report to the Arizona Judicial Council.

The first recommendation was to support Judge Davis' proposal to amend A.R.S. § 13-4041. The proposal would allow a judge or judge's designee to approving billings; and increase the number of hours, from 200 to 500, that an attorney can expend in a capital PCR without seeking court approval. The members were generally supportive of the concept, because an attorney may spend more than 2,000 hours on a capital PCR. The members also agreed that the number of hours mentioned in the statute was a threshold for review rather than a limit on the total number of hours. However, the members questioned why the statute should refer to a number of hours at all. In practice, a judge or an administrator reviews every bill submitted by an attorney on a capital PCR, including any bill for less than 200 hours. An hourly reference may have mattered when the State paid a portion of the bill, but the State no longer pays these bills.

**Motion:** A member moved to approve the recommendation to support Judge Davis' proposal, as long as it remains a threshold rather than a limit; or in the alternative, and preferably, to support the removal of any hourly reference in this statute. The motion received a second and it passed, with five in favor and two abstentions.

The members also discussed whether to recommend an increase in the \$100 hourly rate for court-appointed PCR counsel as specified in A.R.S. § 13-4041. The members believe that increasing the rate to \$125 would not incentivize many new attorneys to undertake a capital PCR; the rate would need to be significantly more to have this effect. On the other hand, if the rate were significantly higher, court-appointed private counsel would be a greater expense for the counties, and that would encourage counties to shift this work to staffed defender offices. The statute allows the Court to set the rate within the legislature's limit ("not to exceed"), but the Court typically allows the maximum rate provided by statute. The federal hourly rate for comparable work is \$175.

**Motion:** A member moved to support an increase in the hourly rate provided by A.R.S. § 13-4041 from \$100 to \$125. The motion received a second and it passed, with five in favor and two abstentions.

The Chair encouraged stakeholders with an interest in this issue to find a unified approach prior to any legislative hearing.

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Other suggested changes to the draft report included the following:

- The discussion following recommendation #2 should mention the Oversight Committee's consensus at the February 2012 meeting to support a screening advisory panel.
- The language in footnote 5 about the holding in *Martinez v Ryan* needs editing; Mr. Cattani should assist in the revision.
- In section II, the first sentence states, "Data supports many of the conclusions in this report." This is debatable and staff should delete the sentence.
- On recommendation #3, staff should add that APAAC provides capital case training.
- The discussion on PCRs should note that earlier this year, the number of capital defendants without court-appointed counsel was down to one. The conclusion should not characterize the appointments as "prompt" because it is too early to know; and it should refer to "more" rather than "most" defendants receiving counsel. The report's discussion should note that this issue is one of continuing concern. Ms. Hallam will assist in phrasing these points.
- In the discussion of capital cases in Maricopa County, the number of capital cases "has" trended down, but saying that the number "is" trending down makes a future forecast that could be erroneous.
- The members did not agree with recommendation #4, to disband the committee. The Court should not disband the committee because there are ongoing issues and there will be new ones, too. One member commented that as long as there is a death penalty in Arizona, issues would continue to arise. The members of the committee have a valuable historical perspective that has developed over the past several years, and this group should remain intact. The report should recommend that the Court extend the committee for a year; or suspend the committee until reactivation is necessary; or make this a permanent committee rather than a temporary one. Because the issues are statewide, the members also recommended the addition of a Pima County member.

Because there will be no further meetings prior to presenting the committee's report to the AJC, the Chair inquired if the members would permit him to finalize the report, after considering the comments made at today's meeting and any subsequent developments.

**Motion:** A member made a motion that the Chair has the authority to finalize the version of the report that the committee will submit to the AJC. That motion received a second, and it carried unanimously.

**8. Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 1:40 p.m.